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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

**No. 770**

I. B. ADELMAN,

*Petitioner,*

*vs.*

PARAMOUNT PICTURES, INC., ET AL.,

*Respondents.*

## REPLY BRIEF FOR PETITIONER

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THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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The various contentions in respondents' briefs are based on fact premises which are without support in this record. They are: (1) There was no finding of antitrust violation with respect to Loew's State, Metropolitan and Majestic and petitioner therefore is not entitled to relief which permits him to compete against these three theatres; (2) the prior hearing on respondent-distributors' motion to modify the decree adjudicated petitioner's "counter-proposal" and such adjudication bars pleading the closing of the Kirby Theatre as a changed circumstance; and (3) the petitioner's first run business is better since the closing of the Kirby and therefore need for modification has not been shown.

These points will be discussed under separate headings in the order stated:

## I.

It is respondents' basic contention that the first run conspiracy and monopoly found by the jury's verdict and Judge Cecil did not encompass exhibitor-respondents' three principal first run theatres, namely, Loew's State and Interstate's Metropolitan and Majestic and that therefore there is no basis for injunctive relief with respect to these theatres either now or at the time the original decree was framed (Dist. Br., pp. 5-14; Ex. Br., pp. 2-5).

Respondents' contention as to the nature of the conspiracy found in this case is expressly contradicted by Judge Cecil's findings and the record at the trial and is completely inconsistent with the position taken by all respondents at the hearing on equitable relief before Judge Cecil in 1955 and the subsequent hearing on modification of the decree in 1956.

It is beyond peradventure on this record that respondents were found guilty, both by the jury's verdict and Judge Cecil, of a conspiracy to monopolize first run exhibition in Houston. Thus, at the trial Judge Cecil instructed the jury to return a verdict for the plaintiff if they found:

> "one or more of the distributor defendants combined and conspired with said [exhibitor] defendants . . . to monopolize the exhibition of first and second run films in the City of Houston, Texas." (Emphasis supplied) (R. 280).

On the issue so framed, the jury returned a verdict in plaintiff's favor.

Subsequently, at the hearing on equitable relief, Judge Cecil found as a matter of law:

> "The defendants have been found by the jury's verdict in this case to have violated Sections 1 and 2 of the Sherman Act *by conspiring with each other to monopolize the first-run and second-run exhibition of*

*films in Houston, Texas.*" (Emphasis supplied) (Conclusion of Law 1, R. 66).

Judge Cecil further found that the Delman had been offered only limited opportunity to compete for first run films with Interstate's Metropolitan, Majestic, Kirby and River Oaks Theatres, and that such restricted competition "has prevented the plaintiff from offering substantial competition to Interstate in either the first-run or second-run exhibition business in Houston *and is a result of the conspiracy to monopolize said first-run and second-run exhibition business found by the jury in this case.*" (Emphasis supplied) (Findings 13 and 18, R. 63-4; 64-5).

The court similarly found that petitioner's Delman had been given "no opportunity to compete with Loew's State theatre for first-run films." (Finding 13, R. 63).

The above Findings on their face clearly include all first run theatres of exhibitors. If, as respondents contend, the first run conspiracy did not apply to the big three theatres why did Judge Cecil refer to them in his Findings?

Respondents' contention rests solely on the premise that petitioner's concession at the trial that the Delman was not able to compete with the big three downtown theatres during the damage period involved (1946-1948) in effect withdrew the issue of a first run conspiracy with respect to these three theatres. Yet, nowhere do respondents demonstrate why this should follow. Whether the Delman could or could not compete with the big three theatres neither proved nor disproved the existence of the first-run conspiracy alleged. This factor was only relevant and material on the question of damages. By his concession, petitioner abandoned any claim to damages based on a comparison of admissions with these theatres, acknowledging that his Delman did not compete in terms of crossing potential.

Petitioner's counsel stated substantially the same thing to Judge Cecil at the hearing on equitable relief, as shown by the following colloquy (R. 286-7):

> "The Court: Was it said upon the trial of this case that the Delman doesn't compete for first run against Loew's State and the Metropolitan?
>
> "Mr. Wright: That is true. That was as of that period. *That concession was certainly made insofar as the award of any damages on a comparison with those theatres was based.* But I don't think, your Honor, that that concession, for the purpose of the jury submission, prevents us from now contending that as of now [plaintiff is entitled to a decree that] * * * tells the distributor defendants that they must give us an equal opportunity to compete for such exclusive runs as they offer. *We don't say they have to license us any picture. We do insist on an equal opportunity to compete with Interstate and with the operator of Loew's State for whatever exclusive runs that are offered.*" (Emphasis supplied.)

Neither Judge Cecil nor opposing counsel took exception to this statement as to the limit of petitioner's concession (R. 286-96).

At no time during that proceeding did respondents' counsel argue to Judge Cecil that there could be no injunctive relief with respect to the big three theatres because they were not within the conspiracy found by the jury. On the contrary, respondents took the position that the jury verdict was only advisory and not binding upon the court and that, in any event, the petitioner had to show that the conspiracy continued since the damage period and that injunctive relief was necessary to prevent future damage (R. 291-2). Respondents objected to a decree which permitted the Delman to compete with *any* of exhibitors' downtown first run theatres, including the Kirby (R. 290-3).

At the 1956 hearing on their motion to permit non exclusive first runs, respondent-distributors opposed petitioner's "counter-proposal" (that he be afforded an opportunity to compete against the big three theatres for films offered on an exclusive first run) on the grounds that (1) there was no formal motion by petitioner before the court and (2) petitioner had failed to demonstrate factually that such relief was warranted. Respondents did not assert that the absence of a conspiracy finding with respect to the big three theatres precluded such relief as a matter of law.

Thus, at no time during the course of the various hearings before Judge Cecil did respondents assert the contention on which they now rely. That point was apparently conceived only after the death of Judge Cecil and the transfer of the case to Judge Ingraham.

## II.

Respondents next argue that petitioner is barred from pleading the closing of the Kirby Theatre as a changed circumstance and as a ground for modification of the decree because he had a reasonable opportunity to present such fact at the time of the hearing on respondent-distributors' motion to modify the decree to permit non-exclusive first run exhibitions (Dist. Br., pp. 15-20; Ex. Br., pp. 8-10). The underlying assumption is that there was an adjudication of petitioner's "counter-proposal" (that paragraph 3 A also be modified to permit the Delman to compete against respondent-exhibitors' three downtown theatres for first run films) at the prior hearing. Unless there was an express determination that petitioner was not entitled to the relief requested, there can be no estoppel even under respondents' theory (see quote from *Restatement of Judgments, Sec. 1*, Dist. Br., p. 17; Ex. Br., p. 9).

Respondents admit that at the prior hearing petitioner filed no formal motion with the court and that respondents opposed consideration of petitioner's "counter-proposal." Distributors argued that the "sole question at issue" was their motion to permit non-exclusive first runs and that petitioner's proposal was not properly before the court.

In a separate memorandum, Interstate said (R. 91-2):

> "* * * This defendant vigorously objects to the suggestion made by plaintiff * * *. There was no motion by plaintiff for such relief—no application or pleadings of any such nature have been filed by plaintiff. * * * *.*
>
> "Of course, the plaintiff upon motion and suitable proof can urge upon the court a proper modification of the decree, and of course the court upon its own motion and upon notice to the parties may make a proper modification of the decree, *but neither such course has been followed* * * *." (Emphasis supplied).

It is further admitted on this record that the order entered by Judge Cecil made no mention of petitioner's counter-proposal or any adjudication with respect thereto (R. 94-95). *The order was prepared by respondents' counsel* and, in a letter to all counsel announcing his decision, Judge Cecil said in part:

> "I have decided to grant the Motions of distributor-defendants Requesting the Modification of Paragraph 3-A of the Decree and an Interpretation of Paragraph 3-B, and I have this day signed form of Order presented to me last December by counsel for the movants."

Certainly, respondents' counsel would have included in their draft order the adverse ruling on petitioner's counter-proposal if such adjudication had, in fact, occurred. Under the circumstances, there is no basis for the assumption

that the court considered and *determined* such proposal where nothing affirmatively appears of record that this was the case.

III.

Respondents finally argue that petitioner, in any event, has failed to demonstrate factually any basis for the requested modification; that, in fact, petitioner is better off since the closing of the Kirby Theatre than before (Dist. Br. p. 19; Ex. Br. pp. 8-9).

This argument assumes that the merits of the petition for modification were before the trial Court. Yet Judge Ingraham expressly ruled that since he was dismissing the petition on the basis of the defenses of *res judicata* and estoppel, it was not necessary to reach the merits of the petition (R. 233-4). He denied petitioner's request for a hearing to present testimony and other evidence in support of the allegations of the petition on the ground that the question of a hearing was moot in view of his ruling on the legal issues (R. 233-4). The court below affirmed this decision.

Under these circumstances, the allegations of the petition with regard to the "before and after" effects of the closing of the Kirby Theatre must be taken as true. The petition alleges, *inter alia* (Par. 5, R. 98):

> "* * * that since the entry of the aforesaid decree the Kirby Theatre operated by Interstate Circuit has ceased operating as a first run theatre and that heretofore, under the decree of this Court plaintiff was afforded an opportunity to compete for first run motion pictures with said Kirby Theatre which were made available to that theatre under the Houston releasing system as a first-run theatre, but *now the Loew's State, Metropolitan and Majestic Theatres, utilize the first run pictures that were heretofore available to said Kirby Theatre*, so that now plaintiff is afforded no

opportunity at all to bid against or compete with any downtown first run theatre for an exclusive first run showing of such motion pictures in the City of Houston as are suitable for first run showing * * *" (Emphasis supplied).

This allegation is completely supported by petitioner's interrogatory answers which show available first run product was reduced by one-third after the Kirby closed.*

## Conclusion.

For the reasons stated here and in our original petition, we most respectfully submit that a writ of certiorari should issue.

Respectfully submitted,

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*Although respondents in a footnote (Dist. Br. p. 19) and appendix purport to analyze petitioner's "first run" business before and after the closing of the Kirby, they omit from this analysis the most significant fact, *i.e., the availability of first run product to petitioner's Delman*. This was the question put to petitioner in Interrogatories 3 and 4, to which respondents significantly make no reference.

The interrogatory answers show that in the seven-month period (9/15/55-4/15/56) prior to the closing of the Kirby Theatre, petitioner received an invitation to bid or negotiate for 97 first run pictures, including 15 reissues (R. 159-68); that during the forty-one-month period (4/16/56-9/15/59) subsequent to the closing of the Kirby Theatre, petitioner received an invitation to bid or negotiate for 380 first run films, including 40 reissues (R. 168-93). Thus, in the first period, petitioner had available to him an average of 13.85 first run films per month. In the second period, petitioner had available to him 9.268 first run films per month. This represents a reduction of 33.08% per month in the number of first run pictures available to petitioner in the period subsequent to the closing of the Kirby Theatre.